

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 73 of 1999

with

SECOND APPEAL No. 74 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO
1 to 5 No

GHANSHYAM GIR BALDEV GIR GOSAI

Versus

SOMGIR

Appearance:

MR MIHIR H JOSHI for Petitioner

MR MAHESH THAKAR for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 27/07/1999

C.A.V. COMMON JUDGEMENT

1. Heard learned counsel Mr. Mihir H.Joshi on behalf of the appellant and learned counsel Mr. Mahesh Thakar on behalf of respondent. Both the counsels have

agreed to hear these matters finally and, therefore, the Record and Proceedings of both the Appeals were called for and the matters were heard finally.

2. A few relevant facts of the case are as under:

The present respondent Somgir first filed Regular Civil Suit No. 685 of 1979 against one Baldevgir in the court of Third Joint Civil Judge (Sr. Division), Baroda, in which a declaration was sought that he has right to offer seva puja in the Rokadnath Mahadev Temple situated in Baroda. That his right of seva puja is joint with defendant and one house bearing Municipal Census No.SH-3152 belongs to him and the defendant as coparcener and that injunction was sought against the defendant not to transfer the right of seva puja and to transfer the above mentioned suit house. It is the case of the plaintiff that he was the adopted son of defendant Baldevgir. The adoption ceremony was performed according to law and customs and religious rites. Plaintiff was then resided with Baldevgir. Plaintiff got married and thereafter the plaintiff with his wife was residing with the family of Baldevgir as joint family and from the income of seva puja of temple Rokadnath Mahadev, the family was maintained. However, some dispute arose and after seven years, the plaintiff came to reside separately from Baldevgir, but he has right to offer seva puja in Rokadnath Mahadev Temple and to receive the income and he has coparcenary interest in suit house because he is legally adopted son of Baldevgir. Baldevgir has got right through inheritance to offer seva puja for certain months of the year in the temple of Rokadnath Mahadev and the suit house is also a coparcenary property. Therefore, the suit was filed, which was contested by the defendant Baldevgir and during

the pendency of the above said Suit No. 685 of 1979. Baldevgir published a public notice in a newspaper on 3rd August, 1979 and in the said publication, Baldevgir stated that he had adopted one Ghanashyamgir as his son and that he has alienated all his properties to his wife by executing a will. Having this notice being published, the present plaintiff filed one more suit being Regular Civil Suit No. 82 of 1980 against the defendants No. 1 and 2 ie. Baldevgir Bhavangir Gosai and Ghanashyamgir Baldevgir Gosai respectively, wherein the plaintiff claimed that the Ghanshyamgir cannot be the legally adopted son of Baldevgir because once he is adopted

legally by Baldevgir, and therefore, the second adoption of Ghanshyamgir Baldevgir Gosai by Baldevgir even by registered deed was null and void and Ghanshyamgir Baldevgir Gosai, according to plaintiff has no right, title or interest as adopted son of Baldevgir. Plaintiff sought declaration in Regular Civil Suit No. 82 of 1980 that the adoption of Ghanshyamgir by Baldevgir as son be declared null and void.

3. Both the defendants contested this suit also, in which it was denied that the plaintiff Somgir was ever adopted by Baldevgir to be his son. It was further contended by the defendants that the plaintiff was the son of Shivgiri Shankargiri of village Zarod. Since the plaintiff was studying at Baroda and since he was the son of brother of wife of Baldevgir, he was residing with Baldevgir. It is contended that the plaintiff never performed any puja in Rokadnath temple. Plaintiff is

nothing to do with the right of the seva puja or with the house owned by Baldevgir. Only that on completion of the education, the plaintiff came to reside separately. Both the suits were tried together by the trial court and after considering oral as well as documentary evidence, vide judgment dated 22nd April, 1985, trial court decreed the suit and declared that plaintiff was the legally adopted son of Baldevgir and that the adoption of defendant No.2 Ghanshyamgir by defendant No.1 was illegal, void and ineffectual. It was also declared that the plaintiff had a coparcenary interest in the suit house and, therefore, the defendant No.1 - Baldevgir is restrained to alienate the house causing harm to the interest of the plaintiff.

4. Being aggrieved, Jadavben Baldevgir Gosai, wife of Baldevgir and Ghanshyamgir Baldevgir Gosai, filed Regular Civil Appeal Nos. 206 of 1985 and 207 of 1985 in the court of District Judge at Baroda. In the meantime, original defendant Baldevgir had expired and his heirs Jadavben and Ghanshyamgir - original defendants in Regular Civil Suit No. 82 of 1980 filed the above mentioned Appeals against the above said decision of the trial judge in Regular Civil Suit No. 685 of 1979 and 82 of 1980.

5. Both the above Regular Civil Appeals No. 206 of 1985 and 207 of 1985 were heard together by the Third Extra Assistant Judge at Baroda and that judgment dated 31st March, 1999, was pleased to dismiss both the

appeals. Being aggrieved, both the appellants in the above said appeals filed the Second Appeal Nos. 73 of 1999 and 74 of 1999 against Somgir the respondent original plaintiff.

6. Following substantial questions of law have arisen in these Second Appeals.

- (1) Whether the findings of the Courts below that the respondent plaintiff was legally adopted son of original Defendant No.1 Baldevgir (since deceased), that the adoption of the appellant defendant by Baldevgir was illegal and void and that the plaintiff had a coparcenary interest in the suit house are perverse as being completely contrary to the voluminous documentary evidence on record?
- (2) Whether the finding of the Courts below that the respondent is the validly adopted son of deceased Baldevgir is contrary to Section 10 of the Hindu Adoption and Maintenance Act, 1956 since he had admittedly completed the age of 15 years at the time of adoption and was, therefore, not capable of being taken in adoption and no proof of custom or usage to the contrary of adduced nor was the issue considered for upholding the validity of adoption?

7. Learned Advocate Mr. Mihir Joshi with reference to the points, which have arisen in the Appeals, prefers to refer the evidence of the case and raised the following points :

- (i) Factum of adoption could not be said to have been proved because adoptive father Baldevgir has denied the factum of the adoption of the plaintiff in W.S. as well as in deposition.
- (ii) There is no evidence of independent witness regarding the adoption of the plaintiff. There is evidence of only the natural father of the plaintiff i.e. Shivgiri Shankargiri and one Umedbharti, against whom the appellants have enmity.

(iii) Relying on the decision of the Supreme Court in the matter of KISHORI LAL vs. MT. CHALTIBHAI, reported in AIR 1959 SC 504, it is stated that since the adoption results in changing the course of adoption, an evidence to prove adoption must be free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth.

(iv) Mr. Joshi has further relied upon a decision of the Supreme Court in the matter of A.RAGHAVAMMA vs. CHENCHAMMA, reported in AIR 1964 136 and has argued that unless compelling circumstances dispensed with all formalities, it is unthinkable that in a village there could have been an adoption made in an affluent family without pomp and show.

(v) Mr. Joshi argued that some of the documents which show that Baldevgir is shown to be the father of the plaintiff ought not to have taken into consideration by the Courts below because in some of the documents Shivgiri Shankargiri is shown to be the natural father of the plaintiff.

(vi) The conduct of the parties, subsequently, from the evidence denotes that there was no adoption of the plaintiff, and that no date on which the adoption took place has been proved by the plaintiff.

8. Learned Advocate Mr.Thakkar on behalf of the respondent has supported the decision of both the courts below and has argued that the adoption of the plaintiff is amply proved and since the plaintiff is adopted, the adoption of Ghanshyamgir is hit by the adoption of the plaintiff and by operation of Section 10(3) of the Hindu Adoption and Maintenance Act, 1956 because at the time of adoption, Ghanashyamgir was admittedly a married person and unless custom so permits, this adoption is invalid according to Sec. 10 (3) of the Hindu Adoption and Maintenance Act.

9. Considering the rival contentions of the

counsels, and scrutinising the record, it clearly appears that the trial court has taken into consideration the oral evidence on behalf of the plaintiff produced by his

natural father Shivgiri Shankargiri and one Umedbharti, who was for some time staying with Baldevgir and the evidence of the plaintiff himself. This is confirmed by the Appellate Court that there is no cogent reason from the record that why this evidence should not be believed. In all cases, an independent evidence is required to prove certain facts is not the rule of law. The rule of law is what is evidence on record is acceptable or not. The evidence is of the relative or independent witnesses, then due care and caution be taken in scrutinising and appreciating the evidence. From the record, it clearly appears that the trial court has taken due care to appreciate the evidence of the plaintiff and his father. Umedbharti i.e. a third witness on behalf of the plaintiff has also supported the first adoption of the plaintiff by Baldevgir. Only because there is some enmity, the evidence of Umedbharti cannot be discarded. Its credit worthiness is required to be appreciated and scrutinised and the task was performed by the trial court properly. From the evidence of these three witnesses, trial court has come to the conclusion that the evidence is credit worthy. These witnesses were again placed at the scrutiny of the first appellate court and the first appellate court also could not find any fault with the credit worthiness of the evidence of the plaintiff side. The factum of adoption is proved by this oral evidence. This oral evidence covers some documentary evidence, on which also the trial court as well as the appellate court have placed reliance. Amongst those documents, the first document is the invitation card for the marriage of the

plaintiff, which is produced at Exhibit 41. This invitation card of the plaintiff's marriage with Geetaben, in which Baldevgir is shown to be the father of the plaintiff. No proper explanation for this could be obtained from defendant No.1 in the evidence i.e. from Baldevgir. In this regard Mr.Joshi has argued that there are some documents also, in which it is found that the father of the plaintiff is shown to be Shivgiri Shankargiri i.e. his natural father. But, what is material is an important event like marriage of the plaintiff, the invitation cards are printed and distributed, in which defendant No.1 Baldevgir is shown to be the father of the plaintiff. Nobody would even imagine to show somebody as his father in such invitation

card. In this circumstance the substantial evidence is the oral say of the plaintiff. As stated above, in most of the documents defendant No.1 is shown to be the father of Somgir. It is not material that in some of the government records, like ration cards and employment exchange cards, name of Shivgiri Shankargiri is shown to be the father of the plaintiff. For which, the plaintiff has given the proper explanation that the employment exchange card and the ration card cannot contain the name of adoptive father. One more factor which is in evidence is the marriage of the brother of the plaintiff Mandragiri, which was performed on 6th March, 1975. The invitation card is produced at Exh.44 and this card also denotes that Baldevgir was the father of the plaintiff. Nobody in natural conduct would produce such false documents when there was no dispute and to create an

evidence falsely and to show somebody as his father to substantiate litigations which is to be ensued in future. The same way, the marriage invitation card of Manjula, a real sister of the plaintiff, reveals that Baldevgir was the father of the plaintiff and the marriage was performed on 17th February, 1973. This factum also weighed with the courts below that right from 1968 to about 1976 - 77, the plaintiff stayed, with Baldevgir and this is the admitted fact. Not only that, plaintiff stayed even after his marriage with Baldevgir. If somebody is not shown as his adopted son, it is not possible that a family would stay together as has been done in the present case. This is evident from the receipt passed by the wife of the plaintiff to Baldevgir when the plaintiff came to reside separately around 1977. This receipt is the evidence of cohabitation by the plaintiff and his family with Baldevgir and his family. It is argued that in that receipt, the plaintiff is shown to be the son of Shivgiri Shankargiri, but, it makes no difference in view of voluminous evidence on record to denote that the plaintiff was in so many occasions shown as the son of Baldevgir. In the receipt - Exh.42, the plaintiff is shown to be the son of Shivgiri Shankargiri, would not negative the factum that in so many records and documents, plaintiff is shown to be the son of Baldevgir. Not only that the supporting evidence - the voter's list is an important document - Exh.43 and that is a copy of insertion of the names of the voters in the list. This copy was alleged to have been filled-in by Baldevgir in his own handwriting and plaintiff is shown to be his son.

In the evidence, Baldevgir denied this fact, but, the trial court under the power vested in it by Sec. 73 of the Evidence Act, came to the conclusion that the signature and the writing on the copy (Exh.43) were of Baldevgir. In my view, there cannot be any superior evidence or better evidence than produced in this case by the plaintiff orally as well as documentary evidence to prove his contention and for the reasons mentioned above, this evidence cannot be said to have been tainted by any suspicion or fraud.

10. In the principle laid down in the above mentioned case of KISHORI LAL (Supra), in para-7, it has been observed by the Supreme Court as under :

" As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth. Failure to produce accounts, in circumstances such as have been proved in the present case, would be a very suspicious circumstance. The importance of accounts was emphasised by Privy Council in Sootrugun v. Sabitra, 2 Knapp 287; in Diwakar Rao v. Chandanlal Rao, ILR 44 Cal 201 : (AIR 1916 PC 81); in Kishorilal v. Chunnilal, 36 Ind App 9; in Lal Kumar v. Charanji Lal, 37 Ind App 1 at p.7; and in Padmala v. Fakira Debya, AIR 1931 PC 84."

11. Learned counsel Mr. Mihir Joshi has argued that the Supreme Court in this judgment has relied upon some

of the documents as has been produced in this case to prove the factum of adoption. On reading this, it appears that on facts, the case before the Supreme Court and the case before this court differs as stated above, and in the present case, there is overwhelming documentary evidence, for which no explanation at all, has been coming forward from defendant No.1 which probablies the factum of adoption as narrated in the oral evidence. The evidence in the present case, therefore, stands to the test laid down by the Supreme Court in the

above mentioned case in Para-7. The same way, the facts of the case of the Supreme Court in the matter of RAGHAVAMMA (Supra) are also different. In this case, some ceremonies, according to the custom, were performed by Baldevgir and the family of the plaintiff, and as such, the pomp or invitation cards for the adoption was not perhaps felt necessary by the concerned party, because the ceremony was performed amongst relatives and invitees and, therefore, this decision of the Hon'ble Supreme Court is not helpful to the appellants having regard to the facts and circumstances of this case. Ceremony has taken place in Baroda and family appears not to be so affluent as to demonstrate pomp, etc.

12. Mr. Mihir Joshi has drawn my attention to the observation of the first appellate court, where the first appellate court has observed that " if the oral evidence is on record without existence of the other consequential circumstances arising out of the adoption, the court would have restrained itself from concluding that the

plaintiff has failed to prove the adoption, but, in the present case, the trial court has not only considered deposition on behalf of plaintiff about the adoption ceremony, but the other circumstances that arose after the adoption and now, let us see those circumstances one by one" and has argued that the courts below are not satisfied with the oral evidence of the plaintiff, but the circumstances have been taken into consideration by the courts below and according to Mr.Joshi, those circumstances are the evidence of invitation cards of the marriage of the plaintiff and other documents. Mr. Joshi argued that according to the decision of the Supreme Court in KISHORI LAL (supra) such documents cannot be taken into consideration to prove the facts of the adoption and no presumption can be drawn from this evidence and, therefore, the adoption could not be said to have been proved.

13. The reasoning given by the courts below are to be read together and scrutinising both the decision of the courts below, it is clear that both the courts have clearly relied on the oral evidence of the plaintiff and to strengthen that evidence, support of the documentary evidence is taken into consideration. Not only that but the documentary evidence as an independent evidence also has been accepted by the courts below, and after that judicial exercise, both the courts below have come to the conclusion that the factum of adoption has been proved and hence it cannot be said that the other circumstances

since cannot be taken into consideration, since the oral

evidence is not sufficient to establish the factum of adoption, as stated by the appellate court, the adoption is not proved. On the contrary, the documents like invitation cards, not once but thrice, other documents like admitted cohabitation of plaintiff's family and the family of the Baldevgir for about six to seven years, receipt and documents, etc. denote that the adoption of the plaintiff had taken place and by oral evidence which is beyond suspicion it is established that the custom and the rites were performed and the giving and taking of the adoption was properly done. There is no reason to disbelieve this evidence or there is no reason to interfere with the concurrent findings of both the courts below because there is no case of misreading of evidence, or case of no evidence or case of perverse finding.

14. In view of the above reasons, the argument on behalf of the appellants that since Baldevgir an adoptive father has denied the factum of evidence, and that there is no independent evidence, and that the documents like invitation cards, cannot be taken into consideration, and that in some of the government records, like ration cards, employment exchange cards, denote the name of natural father, the adoption of plaintiff cannot be said to have been proved, cannot be sustained and upheld. In this view of the matter, the very first substantial question raised in these appeals is required to be

answered in negative and it is required to be held that both the courts below have considered the evidence in judicial manner and have rightly come to the conclusion that the adoption of plaintiff has been proved.

15. So far as the second aspect of the matter is concerned that the adoption of Ghanshayamgir is concerned, this adoption is hit by two reasons. First one is if the adoption of plaintiff is proved, then, Baldevgir is not entitled to have the second adoption of the son and according to Sec. 10(3) of the Hindu Adoption and Maintenance Act, a married person cannot be adopted. It is an admitted fact that when Somgir plaintiff was taken in adoption, he was not married but Ghansyamgir when he was taken in adoption was admittedly

married. Then in that case, heavy burden lies on Baldevgir that there was a custom of taking married person in adoption. Sofar as the first aspect is concerned, it is proved beyond suspicion that the plaintiff respondent Somgir was taken in adoption and, therefore, a second adoption by parents, even by registered deed is hit by a fact that second adoption of son is illegal and secondly it is not proved that there was a custom in caste to take married person in adoption and, therefore, second adoption is also hit by provisions of Sec. 10(3) of Hindu Adoption and Maintenance Act. Attempts were made by the defendant to prove by oral evidence that there was such custom and a deed of

adoption is also produced. But, in that deed, it is not certain that the person, who was taken in adoption was married or not. Except that the few words from the mouth of the defendant, there is nothing on record to denote the custom of taking married person in adoption. Custom cannot be said to be have been proved in this manner.

16. It is a celebrated principle of law that it must be proved that a custom is observed since time immemorable and universally accepted by section of people of society, then and then the custom is said to have been proved and, therefore, the second substantial question of law which is raised in these Second Appeals is also replied in negative for the reasons stated above.

17. So far as taking in adoption of a person of more than 15 years of age, both parties appears to have been in agreement in regard to custom in that respect.

18. In view of the above discussions, both the Appeals are dismissed with no order as to costs.

19. Record and Proceedings of the courts below be sent forthwith.

20. In view of the orders passed in the main Appeals,

no order on Civil Application No. 4800 of 1999 in Second Appeal No. 73 of 1999 and on Civil Application No. 4801 of 1999 in Second Appeal No. 74 of 1999. The stay granted by the Assistant Judge of the First Appellate Court is extended till 15.9.1999 in case appellants intend to approach the Apex Court.

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